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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 186

JOHN PATRICK GILL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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INDEX.

	PAGE
Petition for Writ of Certiorari	1
Opinion Below	2
Basis of Jurisdiction	2
Questions Presented	2
Statement of Matter Involved	4
Reasons for Allowance of the Writ	13
Conclusion	21

STATUTES AND RULE INVOLVED.

Section 1, Title 18, U. S. C.	13, 23
Section 7, Title 18, U. S. C.	23
Section 13, Title 18, U. S. C.	2, 13, 24
Section 113, Title 18, U. S. C.	2, 13, 23
Rule 7(c) of the Rules of Criminal Procedure for the United States District Court	26
Amendment VI, Constitution of the United States	26
Section 10-4221, Burns Indiana Statutes	13, 24
Section 10-401, Burns Indiana Statutes	16, 24
Section 9-1821, Burns Indiana Statutes	16, 24
Chapter 57, Acts of the 14th Congress; 3 Storey's Statutes of the United States, page 1565	25
Illinois Revised Statutes, 1951, Chap. 38, Sec. 59a	26
Michigan Statutes Ann. Title 28, Sec. 28.279	26

LIST OF AUTHORITIES.

Illinois Central Railroad Co. v. Illinois, 146 U. S. 387, 484 19

Beavers v. Henkel, 194 U. S. 73, 83..... 20

People of Puerto Rico v. Shell Co., 302 U. S. 253, 266, 55 S. Ct. 167, 173, 82 L. Ed. 235..... 14

Johnson v. Yellow Cab Transit Co., 321 U. S. 383, 399, 64 S. Ct. 622, 88 L. Ed. 814, 825.....14, 16

United States v. Johnson, 323 U. S. 273, 276..... 20

United States v. Peterson, 64 F. 146..... 19

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, John Patrick Gill, prays that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals for the Seventh Circuit which was entered in this case between the above named parties on May 8, 1953, affirming the judgment of the United States District Court for the Northern District of Indiana, Hammond Division. The petition for rehearing was denied on June 17, 1953.

THE OPINION BELOW.

The Circuit Court of Appeals for the Seventh Circuit affirmed the judgment sentencing the Petitioner to imprisonment on Count 3 for a term of 10 years and fined $3,000.00; he was sentenced to serve 5 years on Count 1 to run concurrently with the sentence on Count 3; and he was also sentenced to serve 6 months on Count 2 to run concurrently with the sentence on Count 3.

The opinion has not yet been reported. It appears in the record at pages 215-221.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

1. Count III of the indictment charged the petitioner with an assault to commit a felony, sodomy, in violation of Title 18, U. S. C., Section 113(b), the same taking place on Lake Michigan within the special maritime jurisdiction of the United States. Said Section 113(b) of Title 18 punishes an assault with intent to commit a felony, except murder or rape, by fine of not more than $3,000 or imprisonment for not more than ten years or both. Sodomy is not a crime under the Federal code. Section 13, Title 18, U. S. C. (the Assimilative Crimes Act) punishes any crime, if committed within the special maritime jurisdiction of the United States, which, although not punishable by any enactment of Congress, would be punishable if committed within the jurisdiction of the State in which said place is situated by a like punishment provided for in the State Statutes. The indictment alleged that the said assault took place in the District of Northern Indiana. The Northern boundary of

Indiana as fixed by an Act of the 14th Congress, is an East and West latitudinal line ten miles North of the Southern extreme of Lake Michigan. Indiana has a statute which punishes an assault with intent to commit a felony with imprisonment for not less than one nor more than ten years; no fine is provided for. The question presented to this Court, with respect to the foregoing facts, is whether the petitioner should not have been indicted under the Indiana statute defining and punishing an assault with intent to commit a felony.

2. Based upon the facts recited in the foregoing paragraph, the question presented is whether the petitioner should not have been punished under Count III, if guilty thereof, with imprisonment for not less than one year nor more than ten years, without any fine, subject to the indeterminate sentence statute of the State of Indiana which provides that instead of pronouncing against a defendant a definite term of imprisonment after a verdict of guilty, the court shall sentence the defendant for an indeterminate period, stating the minimum and maximum limits thereof.

3. In addition to the facts recited in the foregoing paragraph 1, it appears that the Eastern boundary line of the State of Illinois is the center of Lake Michigan and that the Western boundary line of the State of Michigan is the same center line of Lake Michigan. The State of Illinois punishes an assault with intent to commit a lewd or lascivious act upon the person of another with a fine of $500.00 or imprisonment for one year or both fine and imprisonment. Michigan does not punish an assault with intent to commit a felony. The question is then presented whether the Trial Court should not have required proof beyond a reasonable doubt of the exact place where the alleged assault with intent to commit sodomy was committed.

4. The Sixth Amendment to the Constitution of the

United States provides that in all criminal prosecutions, the accused shall be tried in the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law. The further question presented is whether the situs of the alleged crimes should not have been fixed with precision so it could be determined whether the petitioner was being tried in the proper district.

SUMMARY STATEMENT OF MATTER INVOLVED.

The Petitioner was tried in the District Court for the Northern District of Indiana on three counts of an indictment which charged him with (1) an assault on one Edna Whimsett with a dangerous weapon, a piece of broken bottle, with intent to do bodily harm and without just cause or excuse; (2) assaulting her by striking, beating and wounding her; and (3) assaulting her with intent to commit the felony of sodomy. The indictment alleged that by committing these three assaults the defendant violated Sections 113(c), (d) and (b), respectively, of Title 18 of the United States Code. The indictment alleged that the three assaults occurred on a vessel registered under the laws of the United States while the vessel was on a voyage from Chicago, Illinois, to Michigan City, Indiana, upon the waters of Lake Michigan.

Under Count III of the indictment the Court assessed a fine of $3,000 and sentenced the defendant to imprisonment for a period of ten years. Under Count I of the indictment the Court sentenced the defendant to imprisonment for a period of five years and under Count II to imprisonment for a period of six months. The sentences on Counts I and II were to run concurrently with the sentence on Count III.

The principal witness, Edna Whimsett, testified that she met the petitioner for the first time at the Jackson Park

Yacht Club in Chicago, Illinois, and then took a boat ride with the petitioner on Lake Michigan in a boat called the "Pat Pam" (Rec. 20-22). Before boarding the boat she and the petitioner took a drink. They travelled on Lake Michigan for a while, stopping frequently to sun bathe, and during said time she and petitioner had another gin highball (Rec. 23, 24). During this time they were following another boat called the "Norma Jean II." At a certain point in Lake Michigan, the exact location of which appears to be indefinite, the Norma Jean II broke down, having motor trouble, and Mrs. Whimsett came along side the Norma Jean II and asked whether the passengers needed any help. They then left the Norma Jean II, driving straight East; they didn't see the Norma Jean II again. Mrs. Whimsett testified further that the petitioner took off his trunks, threw her on her knees with a jujitsu hold on her arm and asked her to commit an unnatural act which she refused (Rec 27, 28). Then the petitioner, according to the witness, ordered her to mix more drinks. She had an ice pick with which she was cracking the ice which he grabbed saying he was going to stick it into her, but he didn't touch her (Rec. 29). She poured her glass of gin in the sink and the petitioner then struck her in her eye with his fist and then ordered her to mix another drink for both (Rec. 30). She poured her drink on a cushion on the back of the boat and the petitioner, seeing her do that, hit her in the other eye (Rec. 30).

She testified further that the petitioner "drove out into the Lake, saying that they were not going to Michigan City, until she did what he wanted her to do." After the petitioner had been driving for some few minutes, she "sneaked up behind him" and hit petitioner with a gin bottle. She then threw the bottle on the floor and it broke; the blow only stunned him for a minute. The petitioner thereupon jumped out of his seat and picked up the neck of the bottle

and swung it at the witness, on her face and neck. He slashed her arm with it, and also her hip (Rec. 31, 32). He then knocked her down kicked her and choked her and pushed her into the Lake (Rec. 33) the waves of which were high and the water very rough. After a few minutes she got back into the boat and he pushed her into the Lake again; she managed to get back in the boat (Rec. 34).

The witness testified further that she then took the wheel of the boat and steered it, testifying further that "she didn't know where they were, and they seemed to be in the middle of the Lake, as far as she was concerned." She saw a smokestack and steered toward it; the boat docked at Michigan City (Rec. 35). She was asked where the acts to which she was testifying were committed and she replied, "We were bound to have been in Indiana, we could not have been anywhere else."

After they left the Norma Jean II, the sea became very rough, the waves were high enough to come over the back of the boat and splash against the window (Rec. 50). The farther out they were in the Lake, the rougher it was (Rec. 51). She hit the petitioner as hard as she could with the bottle and thought the petitioner probably had a hard head. About ten or fifteen minutes elapsed from the time she struck him until he pushed her into the Lake. After the witness first saw the smokestacks in Michigan City, it took about twenty minutes to get into the harbor (Rec. 65).

Government witness, Chauncey Robinson, the owner of the boat "Norma Jean II," testified that on July 7, 1951, the day named in the indictment when the alleged crimes were committed, he took a trip in his boat to Michigan City. He noticed the Pat Pam, which was not following a straight course but was going around in circles and zig-zagging (Rec. 76). About five or six o'clock in the evening the Norma Jean II broke down. The witness testified that

his boat was *probably* three miles off shore from Burns Ditch, and off the Indiana shore; he was ten or twelve miles from Michigan City. The occupants of the Pat Pam asked him if he needed any help (Rec. 76).

On the trip from Chicago to the point where the "Norma Jean II" had motor trouble he passed a black-red can buoy that marks a shipwreck on the lower edge of the lake. It is approximately east of South Chicago. This buoy is shown on the Coast Guard geodetic chart, Government Exhibit 26. The witness could tell where his position was by looking at the buoy. The witness further testified, "We had gone past the buoy before the motor shut off. I suppose maybe half an hour before that we had passed this buoy." From the point where the motor broke down there was a large water tower over near Burns Ditch, and it is from this water tower that he could tell he was near Burns Ditch. The "Pat Pam" had been following the "Norma Jean II" for possibly a half hour or hour before the motor of his boat stopped running. Before that the "Pat Pam" was about half a mile away (Rec. 78-79).

On cross-examination, the witness testified that at times it is most difficult to tell how far one is away, while on water, from an object that appears on shore, and that the overcast is one of the factors that makes it difficult to see distances. He stated that it is pretty easy to be mistaken about how far away one is from a given point when one is on water looking towards that point on land. The witness was not sure that the landmark for Burns Ditch is shown on the map, but the witness knew that it is close to Burns Ditch. He couldn't tell exactly how far off shore his boat was at the time the "Pat Pam" came up to it, and that he would have to get a sextant angle on the height of the object, to tell exactly how far away it is. He did not do that. The witness had no way of knowing how far he was from the Indiana shore except from the course he followed

after he left the black can buoy. At the time the "Pat Pam" came up to his boat there were moderate swells in the sea (Rec. 80).

The witness made no "fix" to determine whether he was 3 miles off shore. It was merely his recollection. Since the incident took place he and the other people on the boat talked about how far they were off shore and no two witnesses on the boat agreed. After the "Pat Pam" came up to his boat he didn't know whether it headed north or in what direction it went. He traveled along on one motor at about 5 miles an hour (Rec. 81).

It took about an hour to repair the motor and then it took about an hour to get into Michigan City at a speed of about 10 miles per hour. They got into Michigan City at 8:00 o'clock daylight saving time (Rec. 82).

The witness marked with an X, the buoy, which he previously described in his testimony, on Government's Exhibit 26, a map of Lake Michigan, U. S. Lake Survey from the Corps of Engineers, U. S. Army, Chart No. 75 (Rec. 115). He couldn't mark the place where the motor broke down. The buoy was on the right side of his boat. The witness then marked an X at the approximate spot on the map where his motor broke down, and marked the water tower which the witness said he observed as Point XA on Government's Exhibit 26 (Rec. 116).

On cross-examination, he testified that the X inside of the zero, marked on Government's Exhibit 26, might be 3 or 4 or as much as 5 miles away; the witness didn't know exactly. The spot he marked is not an accurate designation (Rec. 116). He didn't know what direction the "Pat Pam" took after it left his boat because he was working on the motor (Rec. 117).

The Petitioner, John P. Gill, denied all of the accusations of Mrs. Whimsett. He testified that a short time prior to

the trial, his occupation was that of bookmaker. In 1939, he was convicted for illegal possession of alcohol and was given probation for two years. When he was 18 years old he was convicted of robbery and placed on probation. At the time of the trial he was in the rug cleaning business (Rec. 99).

About ten or fifteen minutes after he had left the Norma Jean II, he took over the operation of the boat. Mrs. Whimsett was standing at the sink mixing a drink and shortly after that he received a blow on the head. He fell off the seat and grabbed something to stop himself from falling; he was in a dazed condition. The first thing he was aware of, after the blow on the head, was that he and Mrs. Whimsett were on the floor. They were tussling, she was trying to strike, bite and scratch him and he was struggling to stop her and to pin her down (Rec. 109, 110). He saw a severe cut on Mrs. Whimsett's elbow and observed that she was losing a lot of blood. He used his handkerchief and other materials to stop the bleeding and drove the boat as fast as he could to Michigan City. The speed was about 25 miles an hour and it took him between 45 minutes and an hour to drive the boat into Michigan City (Rec. 112).

Mrs. Whimsett drove the boat for about twenty to twenty-five minutes after they had left the disabled Norma Jean II; at that time they were not within sight of land and he told her he would have to drive or they would never get to Michigan City (Rec. 115). He denied all of Mrs. Whimsett's accusations in detail (Rec. 120-122). He received a cut on his head from Mrs. Whimsett's attack with the gin bottle and his head was paining that day and the next day. When he was at the United States Marshal's office, a doctor was sent for and he was treated for the cut on his head (Rec. 132).

Two witnesses for the Petitioner, Thomas Tiffany (Rec. 134-138) and Donald R. Bullington (Rec. 138-146) testified that they were life guards working for the City of Chicago. Each of them made an attempt to get into the Pat Pam from its rear on a calm day and it was impossible for them to do so. There was nothing on the boat to grasp and the wood was slippery because their hands were wet.

Dr. Elsbeth Gehorsam testified that she was a practicing psychiatrist and had been connected with the Gailor Psychiatric Hospital at the University of Tennessee. In August of 1946, she became acquainted with the complaining witness, at that time named Edna O'Rear. She found that Mrs. O'Rear was a psychopathic personality meaning an unstable personality with a tendency to explosive reactions, to episodic conflicts with environment. There is no cure for a psychopathic personality (Rec. 156).

Dr. Harry R. Hoffman (Rec. 164-175), a psychiatrist who had been connected with the Behavior Clinic of the Criminal Court of Cook County, Illinois, from 1931 to 1941, and who was the State Alienist of the State of Illinois from 1941 to 1949 and who had been Director of the Chicago Neuropsychiatric Institute, testified with respect to a hypothetical question which included the conclusions and diagnosis of Dr. Gehorsam, that Mrs. Whimsett was a psychopathic personality.

The witness testified further:

> "These individuals, psychopathic personalities, do not profit by experience; their judgment is impaired; they are not benefited by punishment or treatment. They show no remorse for their antisocial behavior, and they have outbursts or episodes of aggressive or emotional disturbances.
>
> "Many of them may be placid individuals, like sexual psychopaths; many of them may be chronic alcoholics or drug addicts; many of them are prostitutes;

> and many of them are recidivists, whose behavior is not benefited by incarceration in any kind of an institution. They do have interims where behavior is fairly within the range of normal, where medical men have placed the term or mask of sanity upon them, upon this type of individual."

The bulk of psychopatic personalities are wholly devoid of remorse for their acts and are given to exaggeration and enlargement and magnification of minor events. It is seen frequently where women accuse people of certain acts and magnify it to such an extent that other people really believe it because of their emotional state. One of the common symptoms of a psychopathic personality is to crave the center of attention. These emotional outbursts usually come in episodes, sporadic periods, and it may take vent on people close to them, people whom they love and admire, or it may take place with strangers (Rec. 170). An unprovoked attack on a stranger would be a symptom of a psychopathic personality (Rec. 171).

The petitioner introduced an exhibit, the same being a decree of divorce obtained by Ralph A. O'Rear from Edna R. O'Rear (Rec. 176, 177). Among the findings of the Court in the said decree of divorce was the following:

> "That the defendant frequently quarreled and nagged and abused the complainant, ordered him to leave the house, and on one occasion drew a knife on him and threatened to kill him if he closed his eyes, as charged in the bill."

In rebuttal, the Government produced a witness, Helen Kinson, who testified that she was a passenger on board the Norma Jean II on July 7, 1951. About half an hour to an hour later she saw another boat, which looked like the Pat Pam. It was just idling and drifting and she saw no activity at the time. She was not positive that the boat she saw was the Pat Pam. It was between the Norma Jean II

and the Indiana shore line. She looked through binoculars (Rec. 188-190).

Robert Swindell, Jr., another witness for the Government (Rec. 186, 187) testified similarly to Helen Kinson. He was looking at this second boat through binoculars but didn't see the name "Pat Pam," thereon.

REASONS FOR ALLOWANCE OF THE WRIT.

I.

The Circuit Court of Appeals held that Count III of the indictment alleging an assault with intent to commit the felony of sodomy charged a crime within the meaning of Section 113(b) of Title 18, United States Code. Since sodomy is not a crime under the Federal Code, the holding of the Court of Appeals, and its reason, are probably in conflict with applicable decisions of this Court.

The Court of Appeals reasoned that Section 1 of Title 18 of the United States Code defines a felony as any offense punishable by death or imprisonment for a term exceeding one year.

The Court of Appeals further states that sodomy, when committed within the boundaries of Indiana and within the maritime and territorial jurisdiction of the United States is a crime against the United States since Section 10-4221 of Burns Indiana Statutes Annotated defines sodomy and punishes the same with a fine of not less than $100 nor more than $1,000, to which may be added imprisonment in the State prison for not less than two nor more than fourteen years. Sodomy, therefore, being punished by imprisonment of more than one year, becomes a felony within the purview of Section 1 of Title 18, U. S. C.

The Court of Appeals further reasoned that if on the trip that the "Pat Pam" made on Lake Michigan, the petitioner had committed the crime of sodomy and had been convicted and sentenced for from two to fourteen years by the proper District Court for the crime of sodomy as found in the Indiana Statute, the crime was one against the United

States and specifically falls within the classification of felony as defined in Section 1, U. S. C. (Rec. 217, 218). But the petitioner is not charged with committing sodomy.

Since sodomy is not a crime under the Federal Code, and since there are no common law crimes in the Federal Criminal jurisprudence, it was necessary to indict the petitioner under the Assimilative Crimes Act, as follows (Sec. 13, Title 18, U. S. C.):

> "Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of *any* act or omission which, although not made punishable by any enactment of Congress, would be punishable *if committed* or omitted *within the jurisdiction of the State,* Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and *subject to a like punishment.*" (Italics ours.)

In the case of *People of Puerto Rico* v. *Shell Co.*, 302 U. S. 253, 266, 55 S. Ct. 167, 173, 82 L. Ed. 235, this Court held that prosecutions under U. S. C. A. Section 468 (the Assimilative Crimes Act) "are not to enforce the laws of the state, territory or district, but to enforce the federal law, the details of which, instead of being recited, are adopted by reference."

In the case of *Johnson* v. *Yellow Cab Transit Co.*, 321 U. S. 383, 399, 88 L. Ed. 814, 825, 64 S. Ct. 622, the Supreme Court of the United States said:

> "* * * Congress has three times brought still nearer the effective date of state penal laws applicable on federal reservations, to-wit, by the amendments of June 15, 1933, 48 Stat. 152, c. 85; June 20, 1935, 49 Stat. 394, c. 284, and June 6, 1940, 54 Stat. 234, c. 234. The last Amendment now controls whereby
>
> "'Whoever * * * shall do * * * any act or thing which is not made penal by any laws of Congress, but which if committed or omitted, within the jurisdiction

of the State, Territory, or district in which such place is situated, by the laws thereof in force on February 1, 1940, and remaining in force at the time of the doing * * * of such act or thing, would be penal, shall be deemed guilty of a like offense and be subject to a like punishment.' 18 U. S. C. A. § 468, 7 F. C. A. title 18, § 468. The very important purpose of this legislation in the working of our dual system, as expounded after the fullest consideration heretofore given to this subject by this Court, bears repetition:

'while the statute leaves no doubt where acts are done on reservations which are expressly prohibited and punished as crimes by a law of the United States, that law is dominant and controlling, yet, on the other hand, where no law of the United States has expressly provided for the punishment of offenses committed on reservations, all acts done on such reservations which are made criminal by the laws of the several states are left to be punished under the applicable state statutes. When these results of the statute are borne in mind it becomes manifest that Congress, in adopting it, sedulously considered the twofold character of our constitutional government, and had in view the enlightened purpose, so far as the punishment of crime was concerned, to interfere as little as might be with the authority of the states on that subject over all territory situated within their exterior boundaries, and which hence would be subject to exclusive state jurisdiction but for the existence of a United States reservation. In accomplishing these purposes it is apparent that the statute, instead of fixing by its own terms the punishment for crimes committed on such reservations which were not previously provided for by a law of the United States, adopted and wrote in the state law, with the single difference that the offense, although punished as an offense against the United States, was nevertheless punishable only in the way and to the extent that it would have been punishable if the territory embraced by the reservation remained subject to the jurisdiction of the state.' *United States* v. *Press Pub. Co.*, 219 U. S. 1, 9, 10, 55 L. ed. 65, 66, 67, 31 S. Ct. 212, 21 Ann. Cas. 942."

To the same effect is the case of *Williams* v. *United States of America,* 327 U. S. 711, 90 L. Ed. 962, 66 S. Ct. 778, which construed another form of the Assimilative Crimes Act in force and effect in 1945.

If the crime in Count III of the indictment had been committed within the State of Indiana, the petitioner should have been indicted within the purview and provisions of the Assimilative Crimes Act under Section 10-401 of Burns Indiana Statutes Annotated, reading:

> "Assault and battery with intent to commit felony.—Whoever perpetrates an assault or assault and battery upon any human being with intent to commit a felony, shall, on conviction, be imprisoned in the state prison for not less than one (1) nor more than ten (10) years."

II.

The Court of Appeals in holding that the sentence of the Petitioner under Count III is fixed by Section 113(b), Title 18, U. S. C., rendered a decision in conflict with the applicable decisions of this Court. This Honorable Court, in construing the Assimilative Crimes Act has held that the punishment to be imposed upon a defendant who commits a crime within the purview of that Section must be the same as that provided for by the Statutes of the State in which the crime was committed. *Johnson* v. *Yellow Cab Transit Co.,* 321 U. S. 383, 399, 88 L. Ed. 814, 825, 64 S. Ct. 622; *Williams* v. *United States,* 327 U. S. 711, 90 L. Ed. 962, 66 S. Ct. 778.

Section 10-401 of the Burns Indiana Statutes Annotated punishes an assault with intent to commit a felony by imprisonment for not less than one year nor more than ten years. This is qualified by Section 9-1821, Burns Indiana Statutes Annotated which provides that "instead of pronouncing against such defendant a definite term of impris-

onment, the Court, after such finding or verdict of guilty, shall pronounce against him a sentence for an indeterminate period, stating in such sentence the maximum and minimum limits thereof."

The Trial Court did not so sentence the petitioner, contrary to the Assimilative Crimes Act and applicable decisions of this Court.

III.

The finding of the Court of Appeals that the crime alleged in Count III of the indictment was committed in the State of Indiana was based upon highly speculative evidence and since there was no evidence whatever proving the location in Lake Michigan where the alleged crimes were committed, the Court of Appeals has decided an important question of Federal law which does not seem to have been settled by this Court, but should be so settled. The finding of the Court of Appeals, furthermore, has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision. Under the Assimilative Crimes Act it was imperative that the prosecution prove that the crimes were committed within the State of Indiana. The Northern boundary of Indiana was established by an Act of Congress approved April 19, 1816, which Act is set forth in the appendix hereof. The Northern boundary of Indiana was fixed as an East and West line drawn through a point ten miles North of the Southern extreme of Lake Michigan.

The Court of Appeals states that the complaining witness testified *positively* that at the time of the commission of the crimes charged, the "Pat Pam" was in Indiana. The Court observes further "she did not explain, however, how she knew this" (Rec. 219). On this point the prosecuting witness testified, "We were bound to have been in Indiana; we could not have been anywhere else." This was in reply to

a question, "In what State were you when he did those things?" (Rec. 36.) But at another point, after her testimony that the petitioner pushed her into the Lake (Rec. 34) she testified that she didn't know where they were, and they seemed to be in the middle of the Lake, "as far as she was concerned" (Rec. 35). How could Mrs. Whimsett have known that the alleged crimes took place in Indiana? Certainly she didn't know that the boundary line of Indiana extended ten miles North of the Southern boundary of Lake Michigan.

The further testimony upon which the Court found that the crimes were committed within the State of Indiana is based upon that of Chauncey Robinson, the owner of the "Norma Jean II". The Court of Appeals stated that when the Norma Jean II broke down with engine trouble and at the time the Pat Pam came up to it, the Norma Jean II was about three miles out in the Lake from Burns Ditch. Robinson marked the position with an x on the United States Lake Survey map, Government's Exhibit 29. That testimony only states *where the Norma Jean II* was when Robinson last saw the Pat Pam. The Court of Appeals, however, overlooked his testimony on cross-examination that he couldn't tell exactly how far off shore his boat was at the time the Pat Pam came up to it, and that he would have to get a sextant angle on some object on the shore to tell exactly how far away the shore was; that he did not do. He further testified that since the incident took place, he and a number of other people on his boat talked about how far they were off shore and no two witnesses on the boat agreed (Rec. 80, 81).

That testimony of Robinson, however, only attempts to fix, speculatively, of course, where the Norma Jean II broke down. It does not fix the location where the alleged assault took place.

Robinson testified that after the Pat Pam came up to his boat at the time it had broken down, he didn't know whether it headed North or in what direction it went (Rec. 81; 117). It was at least twenty or twenty-five minutes after the Pat Pam had passed and lost sight of the Norma Jean II that the sea became very rough, according to Mrs. Whimsett (Rec. 50). The farther out in the Lake they went the rougher it was (Rec. 51). Certainly this would indicate that the Pat Pam sailed farther North from the Indiana shore line and not closer to it, and hence, North of the place where the Norma Jean II had stopped for repairs. The Court of Appeals noted that about an hour and a half after the Norma Jean II had left the meeting point with the Pat Pam, two witnesses saw the Pat Pam or a boat of the same lines between the Norma Jean II and the shore. They saw this through binoculars and it seemed to be drifting. But, according to both Mrs. Whimsett and the petitioner, at that time the Pat Pam was speeding on its way to Michigan City to get medical help for Mrs. Whimsett.

It was essential to prove the exact place in Lake Michigan where the alleged crime took place. If the alleged assaults took place North of the Indiana line, and West of the center line of Lake Michigan, they took place in the State of Illinois where an assault with intent to commit a lewd and lascivious act is punished as a misdemeanor with imprisonment of less than one year. If it took place North of the Indiana line and East of the center line of Lake Michigan, the alleged offenses took place in the State of Michigan where assault to commit sodomy is not a crime. The center line of Lake Michigan constitutes the boundary line between the State of Illinois and the State of Michigan. *United States* v. *Peterson,* 64 F. 146, *Illinois Central Railroad Co.* v. *Illinois,* 146 U. S. 387, 484.

IV.

In holding that the alleged crimes were committed in the State of Indiana, upon no evidence whatever, the Court of Appeals rendered a decision in conflict with the Sixth Amendment to the Constitution of the United States and in conflict with applicable decisions of this Court.

The Sixth Amendment to the Constitution of the United States provides that in all criminal prosecutions, the accused shall be tried in the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law.

In the case of *United States* v. *Johnson*, 323 U. S. 273, 276, 65 S. Ct. 251, 89 L. Ed. 236, this Honorable Court held:

> "Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed. If an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it."

In the case of *Beavers* v. *Henkel*, 194 U. S. 73, at page 83, this Court stated:

> "The locality in which an offense is charged to have been committed determines under the Constitution and laws the place and court of trial. And the question is what steps are necessary to bring the alleged offender to that place and before that court."

Counsel have heretofore, under point III hereof, set out that there is no evidence in the record to prove in what District the alleged crimes were committed. In view of the evidence introduced, they could have been committed in the State of Michigan, or the State of Illinois, rather than in the State of Indiana.

Conclusion.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

GEORGE F. CALLAGHAN,
Attorney for Petitioner.

MYER H. GLADSTONE,
Of Counsel.

APPENDIX.

THE STATUTES INVOLVED.

Since counsel for the defendant believe that it is of extreme importance that this Court have in mind the statutes involved before any of the evidence is presented herein, they submit the said statutes at this point.

Section 1, Title 18, U. S. C.

"Any offense punishable by death or imprisonment for a term exceeding one year is a felony."

Section 113, Title 18 U. S. C.

"Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:

"(a) • • •

"(b) Assault with intent to commit any felony, except murder or rape, by fine of not more than $3,000 or imprisonment for not more than ten years, or both.

"(c) Assault with a dangerous weapon, with intent to do bodily harm, and without just cause or excuse, by fine of not more than $1,000 or imprisonment for not more than five years, or both.

"(d) Assault by striking, beating, or wounding, by fine of not more than $500 or imprisonment for not more than six months, or both."

Section 7, Title 18 U. S. C.

"The terms 'special maritime and territorial jurisdiction of the United States,' as used in this title, includes:

"(1) • • •

"(2) Any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes,

or any of the waters connecting them, or upon the Saint Lawrence river where the same constitutes the International Boundary Line."

Section 13, Title 18 U. S. C.

"Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of *any act* or omission which, although not made punishable by any enactment of Congress, would be punishable *if committed* or omitted *within the jurisdiction of the State*, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and *subject to like punishment.*"

Section 10-4221 of Burns Indiana Statutes, Annotated.

"Whoever commits the abominable and detestable crime against nature with mankind or beast; or whoever entices, allures, instigates or aids any person under the age of twenty-one (21) years to commit masturbation or self-pollution shall be deemed guilty of sodomy, and on conviction, shall be fined not less than one hundred dollars ($110) nor more than one thousand dollars ($1,000), to which may be added imprisonment in the state prison not less than two (2) years nor more than fourteen (14) years."

Other statutes of the State of Indiana which are involved are Section 10-401 and Section 9-1821, Burns Indiana Statutes, Annotated. These are as follows:

"10-401. Assault and battery with intent to commit felony.—Whoever perpetrates an assault or assault and battery upon any human being with intent to commit a felony, shall, on conviction, be imprisoned in the state prison for not less than one (1) nor more than ten (10) years."

"9-1821. Indeterminate sentences—Verdict—Age—Sentence to State Prison.—Whenever any male person thirty (30) years of age or over, shall be on trial for

any felony, except treason or murder, the court or jury trying the cause shall ascertain only his age and whether he is guilty of the offense charged; and if more than one (1) offense be charged, it shall be found on which, if any, of such offenses he is guilty, and of which he is not guilty. Instead of pronouncing against such defendant a definite term of imprisonment, the court, after such finding or verdict of guilty, shall pronounce against him a sentence of imprisonment in the State Prison for an indeterminate period, stating in such sentence the maximum and minimum limits thereof, as such maximum and minimum limits of time for the punishment of such offense are now or may hereafter be prescribed by law, excepting in such cases as are provided for in section 2 (§ 9-1820) of this act."

To determine whether the alleged offenses occurred within the boundaries of the State of Indiana, the Act of Congress of 1816 establishing and fixing the Northern Boundary Line of the State of Indiana is herewith set forth (Chap. 57, Acts of the 14th Congress; 3 Storey's Stat. of the United States, page 1565):

"Chap. 57. An act to enable the people of the Indiana territory to form a constitution and state government, and for the admission of such state into the Union on an equal footing with the original states.

"§ 2. That the said state shall consist of all the territory included within the following boundaries, to wit: bounded on the east, by the meridian line which forms the western boundary of the state of Ohio; on the south, by the river Ohio, from the mouth of the Great Miama river to the mouth of the river Wabash; on the west, by a line drawn along the middle of the Wabash, from its mouth to a point where a due north line drawn from the town of Vincennes would last touch the northwestern shore of the said river; and from thence, by a due north line, until the same shall intersect an east and west line, drawn through a point ten miles north of the southern extreme of Lake Michigan; on the north by the said east and west line, until

the same shall intersect the first mentioned meridian line which forms the western boundary of the state of Ohio."

Rule 7(c) of the Rules of Criminal Procedure for the United States District Courts, adopted by the United States Supreme Court:

"* * * The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice."

Ill. Rev. Statutes 1951, Chapter 38, Section 59a:

"An assault made with an intent to commit a lewd or lascivious act upon the person of another shall subject the offender to a fine not exceeding $500.00 or imprisonment in the County Jail or Workhouse for a period not exceeding one year or both such fine and imprisonment."

Mich. Stat. Ann. Title 28, Section 28.279, reading:

"Any person who shall assault another with intent to do bodily harm, less than the crime of murder, shall be guilty of a felony punishable by imprisonment in the state prison not more than ten (10) years, or by fine of not more than five thousand dollars."

Amendment VI, Constitution of the United States:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	4
Argument	7
Conclusion	12

CITATIONS

Cases:	
Delaney v. *United States*, 263 U. S. 586	12
Dunaway v. *United States*, 170 F. 2d 11	9
George v. *United States*, 125 F. 2d 559	10
Kann v. *United States*, 323 U. S. 88	12
United States v. *Chiarelli*, 192 F. 2d 528, certiorari denied, 342 U. S. 913	10
United States v. *Johnson*, 319 U. S. 503	12
United States v. *Karavias*, 170 F. 2d 968	10
Williams v. *United States*, 327 U. S. 711	9
Statutes:	
Act of April 19, 1816, 3 Stat. 289, c. 57, § 2	10
18 U. S. C. 1 (1)	9
18 U. S. C. 7 (2)	2–3, 8
18 U. S. C. 13, the Assimilative Crimes Act	3, 7
18 U. S. C. 113:	
(b)	2, 8, 9
(c)	2
(d)	2
Burns Indiana Statutes, Annotated (1942 Replacement):	
§ 9–1821	8
§ 10–401	4, 8
§ 10–4221	3, 9

268145—53

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 186

JOHN PATRICK GILL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 215–221) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 8, 1953 (R. 222), and a petition for rehearing (R. 227–238) was denied on June 17, 1953 (R. 239). The petition for a writ of certiorari was filed on July 17, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether an assault with intent to commit sodomy during a voyage on Lake Michigan was punishable as a felony under 18 U. S. C. 113 (b), or whether a State statute applied by reason of 18 U. S. C. 13, the Assimilative Crimes Act.

2. Whether venue of the assaults charged was properly proved to be in the Northern District of Indiana.

STATUTES INVOLVED

18 U. S. C. 113:

> Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:
>
> * * * * *
>
> (b) Assault with intent to commit any felony, except murder or rape, by fine of not more than $3,000 or imprisonment for not more than ten years, or both.
>
> (c) Assault with a dangerous weapon, with intent to do bodily harm, and without just cause or excuse, by fine of not more than $1,000 or imprisonment for not more than five years, or both.
>
> (d) Assault by striking, beating, or wounding, by fine of not more than $500 or imprisonment for not more than six months, or both.

18 U. S. C. 7:

The term "special maritime and territorial jurisdiction of the United States," as used in this title, includes:

* * * * *

(2) Any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, or any of the waters connecting them * * *.

18 U. S. C. 13, the Assimilative Crimes Act:

Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to like punishment.

Burns Indiana Statutes, Annotated, § 10–4221 (1942 Replacement):

Whoever commits the abominable and detestable crime against nature with mankind or beast; or whoever entices, allures, instigates or aids any person under the age of twenty-one (21) years to commit masturbation or self-pollution shall be deemed guilty of sodomy, and, on conviction, shall be fined not less than one hundred dollars [$100] nor more than one thousand dollars [$1,-

000], to which may be added imprisonment in the state prison not less than two [2] years nor more than fourteen [14] years.

Burns Indiana Statutes, Annotated, § 10–401 (1942 Replacement):

Assault and battery with intent to commit felony.—Whoever perpetrates an assault or assault and battery upon any human being with intent to commit a felony, shall, on conviction, be imprisoned in the state prison for not less than one [1] nor more than ten [10] years.

STATEMENT

Petitioner was charged in a three-count indictment with assaults upon Edna Whimsett (1) with a broken bottle with intent to do bodily harm; (2) by striking, beating and wounding her; and (3) with intent to commit the felony of sodomy, in violation of 18 U. S. C. 113 (c), (d), and (b), respectively (R. 2–3). The indictment charged that the assaults occurred on a boat registered with the United States Coast Guard during a voyage on Lake Michigan from Chicago, Illinois, to Michigan City, Indiana. The parties agreed by stipulation as to this registration (R. 14). A jury was waived (R. 12). The court found petitioner guilty on all three counts, and sentenced him to imprisonment for ten years and a $3,000 fine on count three, and to imprisonment for five years and for six months on counts one and two, respectively, to run concurrently with the sentence

on count three (R. 199). On appeal, the Court of Appeals affirmed the conviction (R. 200–201, 222). The evidence, which, except on the issue of venue, is not in controversy here, may be summarized as follows:

On the afternoon of July 7, 1951, petitioner asked Mrs. Whimsett to take a ride with him on Lake Michigan in a motor boat, the Pat Pam, from Chicago to Michigan City, Indiana (R. 22). Proceeding in an easterly direction, they followed another boat, the Norma Jean II, also bound for Michigan City, and stopped at intervals to drink gin highballs and to take sun baths (R. 23–25). When the Norma Jean II developed engine trouble, the Pat Pam pulled close by. Mrs. Whimsett asked if the parties aboard needed any help, but they replied that they would be able to make it to Michigan City (R. 26–27, 77). At this time the Norma Jean II was about three miles off the Indiana shore from Burns Ditch, which is approximately seven miles east of Gary, the southernmost part of the Indiana shore of Lake Michigan, and the boat's position was about 10 or 12 miles from Michigan City, which lies northeast of Gary. The owner of the Norma Jean II was able to fix this position by reference to a buoy in the lake which he had passed about one half hour before and to a water tank visible on the shore (R. 77, 78–79, 115–116).

After the meeting with the Norma Jean II, petitioner warned Mrs. Whimsett that she was get-

ting too close to Gary, Indiana, and then directed the course of the boat due east. Having removed his bathing trunks, petitioner threw Mrs. Whimsett to her knees and proposed that she engage in an act of sodomy, but she refused (R. 27–28). Petitioner had been drinking excessively, but Mrs. Whimsett testified that she had had only two drinks during the entire day (R. 63). When she complied with petitioner's command to mix more drinks, he observed her pouring her drink into the sink and blackened her eye with his fist (R. 30). When petitioner saw her pour a second drink on a cushion, he hit her in the other eye (R. 31). Announcing that they were not going anywhere until she did what he wanted, petitioner took the wheel. Mrs. Whimsett hit him over the head with a gin bottle which broke. Petitioner countered with slashes of the broken bottle against her face, neck, arm, and hips (R. 32). When Mrs. Whimsett in desperation started to pray, petitioner put a tourniquet on her arm, and promised to take her to Michigan City if she would agree to say that she had been in an automobile accident (R. 35).

Mrs. Whimsett testified that at the time of the assaults the boat was within the Indiana boundary and that she could see the smokestacks at Michigan City (R. 35–36, 64–65, 66). Two passengers on the Norma Jean II testified that about a half hour or an hour after repairing their engine, after the meeting with the Pat Pam, they saw

with binoculars the Pat Pam or a boat of the same lines between them and the Indiana shore, and that this was the only boat in the vicinity on that day (R. 186–187, 189).

Upon reaching Michigan City, Mrs. Whimsett immediately went to a hospital where she was treated for multiple cuts and bruises (R. 69, 82–83). Petitioner was arrested by Michigan City police for public intoxication (R. 181, 184).

Evidence for the defense included testimony by petitioner, who admitted two previous felony convictions (R. 99, 125). He categorically denied the salient points of Mrs. Whimsett's testimony (R. 120–122). There was defense evidence that in 1946 Mrs. Whimsett's condition in a Memphis psychiatric hospital was diagnosed as that of a psychopathic personality without psychosis (R. 156), and that her behavior on the boat was consistent with that of a psychopathic personality (R. 166–169).

ARGUMENT

Urging only an unsubstantial issue of law and an issue of fact on which the two courts below have agreed, the petition presents no basis for review by this Court.

1. Petitioner contends (Pet. 13–17) that the charge in count three of assault with intent to commit the felony of sodomy should have been laid under 18 U. S. C. 13, the Assimilative Crimes Act, which, he says, made applicable to the circum-

stances of this case the sentencing provisions of Sections 10–401 and 9–1821 of the Indiana Statutes. Building upon this argument, petitioner claims that he should have received an indeterminate sentence of one to ten years rather than the ten years and $3,000 fine adjudged by the trial court on count three.[1] But the argument has no merit.

Petitioner was charged and sentenced under 18 U. S. C. 113 (b), which condemns assault "with intent to commit any felony, except murder or rape * * *." The offense admittedly occurred within the special maritime jurisdiction of the United States[2] where, under the Assimilative Crimes Act (*supra*, p. 3), a person who commits an act "which, although not made punishable by any enactment of Congress, would be punishable if committed * * * within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act * * *, shall be guilty of a like offense and subject to like punishment." Accordingly, while no Federal statute expressly punishes the offense of sodomy, the court below correctly looked to the law of Indiana, in which the

[1] Petitioner does not complain of his sentences under counts one and two, except insofar as he urges that venue in Indiana was not established as to any of the assaults. See pp. 10–12, *infra*.

[2] Under 18 U. S. C. 7 (2), the "special maritime and territorial jurisdiction of the United States" extends to a registered vessel such as the Pat Pam sailing on Lake Michigan.

events occurred, to determine whether the act petitioner intended to commit when he assaulted Mrs. Whimsett constituted a felony. And it is undisputed that under Indiana law (§ 10–4221, *supra*, pp. 3–4) this act was condemned as sodomy, punishable by imprisonment for not less than 2 nor more than 14 years. It follows, again without dispute, that the act petitioner intended is punishable under the Assimilative Crimes Act and is a Federal "felony" within the meaning of 18 U. S. C. 1 (1)[3] and 18 U. S. C. 113 (b).

Petitioner's argument that he should have been sentenced in accordance with Indiana law rather than 18 U. S. C. 113 (b) overlooks the fact that he was indicted and convicted, not for sodomy, but for the offense under 18 U. S. C. 113 (b) of "Assault with intent to commit any felony [here, sodomy], except murder or rape * * *." If the indictment had been for sodomy, petitioner's argument that the Assimilative Crimes Act alone is applicable would be correct. However, 18 U. S. C. 113 (b) prescribes the offense and the punishment in this case. The Assimilative Crimes Act is applicable only in determining an element of the offense—that the sodomy petitioner intended was a felony. Perpetrated with this intent, the assault violated 18 U. S. C. 113 (b), and the punishment this section provides is not affected by the Assimilative Crimes Act. Cf. *Williams* v. *United*

[3] "Any offense punishable by death or imprisonment for a term exceeding one year is a felony."

States, 327 U. S. 711, 717–718; *Dunaway* v. *United States,* 170 F. 2d 11, 12–13 (C. A. 10).

2. Equally without merit is petitioner's contention that venue in Indiana was not proved (Pet. 17–20). Venue, like any other fact, may be proved by circumstantial evidence and inferences, and if under all the evidence it may be reasonably inferred that the crimes were committed where the venue is laid, that is sufficient. Cf. *United States* v. *Chiarelli,* 192 F. 2d 528, 532 (C. A. 7), certiorari denied, 342 U. S. 913; *United States* v. *Karavias,* 170 F. 2d 968, 970 (C. A. 7); *George* v. *United States,* 125 F. 2d 559, 563–564 (C. A. D. C.). The proof in this case, convincing to the two courts below, was plainly ample.

Under the Act of April 19, 1816, 3 Stat. 289, c. 57, § 2, the northern boundary of Indiana as it extended across the southern part of Lake Michigan was described as an "east and west line, drawn through a point ten miles north of the southern extreme of lake Michigan." See Government Exhibit No. 26, being Chart No. 75, 1950, of Lake Michigan, made by the Army Lake Survey, Corps of Engineers. At the time when the Pat Pam met the Norma Jean II, they were located about three miles off the shore from Burns Ditch, approximately seven miles east of Gary, Indiana, and 10 or 12 miles from Michigan City, Indiana. This position, marked on the map (Gov. Ex. 26) and well within the Indiana boundary, was fixed by the owner of the Norma Jean II

by reference to a buoy in the lake which he had passed about a half hour before and to a water tank visible on the shore (R. 77, 78–79, 115–116). After this meeting of the boats, petitioner told Mrs. Whimsett she was getting too close to Gary, and directed the course of the boat due east on a direct line with Michigan City (R. 27). It was shortly after this that the assaults occurred, and Mrs. Whimsett testified that the Pat Pam was then within the Indiana boundary and that she could see the smokestacks at Michigan City (R. 35–36, 64–65, 66). Passengers on the Norma Jean II testified that shortly after their meeting with the Pat Pam, they saw the Pat Pam or a boat of the same lines between them and the Indiana shore, and that this was the only boat in the vicinity on that day (R. 186–187, 189).[4] From the foregoing evidence it is submitted that the trial court properly found (see R. 195) that venue in the Northern District of Indiana had been proved.

Since both courts below found that the evidence was sufficient to prove venue in Indiana, there is no occasion for this Court to weigh the evidence

[4] It is significant, as the court below pointed out (R. 220), that although petitioner was acquainted with the shore line between Chicago and Michigan City and heard the prosecution witnesses testify as to the location of the Pat Pam, he made no denial that the Pat Pam was within the Indiana boundary at the time of the assaults. On other issues, petitioner's testimony contradicated the evidence for the prosecution.

in a proposed attempt by petitioner to draw contrary inferences that the crimes might have occurred in Michigan or Illinois. Cf. *Kann* v. *United States,* 323 U. S. 88, 93; *United States* v. *Johnson,* 319 U. S. 503, 518; *Delaney* v. *United States,* 263 U. S. 586, 589–590.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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